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15 **IN THE UNITED STATES DISTRICT COURT FOR**
16 **THE DISTRICT OF ARIZONA**

17 Deborah Schick, individually and on behalf
18 of a class of all persons and entities similarly
19 situated,

20 Plaintiff,

21 vs.

22 Resolute Bank and John Doe Corporation
23 d/b/a Reverse Mortgage Savings Center,

24 Defendants.

Case No.

CLASS ACTION COMPLAINT

Preliminary Statement

1
2 1. “Month after month, unwanted robocalls and texts, both telemarketing and
3 informational, top the list of consumer complaints received by” the Federal
4 Communications Commission (“FCC”).¹
5

6 2. Plaintiff Deborah Schick brings this action under the Telephone Consumer
7 Protection Act (“TCPA”), 47 U.S.C. § 227, a federal statute enacted in response to
8 widespread public outrage about the proliferation of intrusive, nuisance telemarketing
9 practices. *See Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 745 (2012).
10

11 3. In violation of the TCPA, Defendant Resolute Bank (“Resolute”) hired the
12 co-defendant, John Doe Corporation d/b/a Reverse Mortgage Savings Center (“John
13 Doe”), which made automated telemarketing calls to a cellular telephone number of Ms.
14 Schick for the purposes of advertising Resolute goods and services using an automated
15 dialing system, which is prohibited by the TCPA.
16
17

18 4. John Doe made these calls because of an agreement with Resolute, which
19 hired John Doe to generate business through telemarketing, and maintained interim
20 control over their actions.
21

22 5. The Plaintiff never consented to receive the calls, which were placed to her
23 for telemarketing purposes. Because telemarketing campaigns generally place calls to
24 thousands or even millions of potential customers *en masse*, the Plaintiff brings this
25 action on behalf of a proposed nationwide class of other persons who received illegal
26 telemarketing calls from or on behalf of the Defendants.
27
28

¹ *Omnibus TCPA Order*, GC Docket 02-278, FCC 15-72, 2015 WL 4387780, ¶1 (July 10, 2015).

TCPA Background

12. In 1991, Congress enacted the TCPA to regulate the explosive growth of the telemarketing industry. In so doing, Congress recognized that “[u]nrestricted telemarketing . . . can be an intrusive invasion of privacy.” Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(5) (1991) (codified at 47 U.S.C. § 227).

13. The TCPA makes it unlawful “to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a . . . cellular telephone service.” *See* 47 U.S.C. § 227(b)(1)(A)(iii). The TCPA provides a private cause of action to persons who receive calls in violation of 47 U.S.C. § 227(b)(1)(A). *See* 47 U.S.C. § 227(b)(3).

14. According to findings by the Federal Communication Commission (“FCC”), the agency Congress vested with authority to issue regulations implementing the TCPA, such calls are prohibited because, as Congress found, automated or prerecorded telephone calls are a greater nuisance and invasion of privacy than live solicitation calls, and such calls can be costly and inconvenient.

15. The FCC also recognized that “wireless customers are charged for incoming calls whether they pay in advance or after the minutes are used.” *In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket No. 02-278, Report and Order, 18 F.C.C. Rcd. 14014, 14115 ¶ 165 (2003).

1 16. In 2013, the FCC required prior express written consent for all autodialed
2 or prerecorded telemarketing calls (“robocalls”) to wireless numbers and residential lines.
3 Specifically, it ordered that:
4

5 [A] consumer’s written consent to receive telemarketing robocalls must be
6 signed and be sufficient to show that the consumer: (1) received “clear and
7 conspicuous disclosure” of the consequences of providing the requested
8 consent, i.e., that the consumer will receive future calls that deliver
9 prerecorded messages by or on behalf of a specific seller; and (2) having
10 received this information, agrees unambiguously to receive such calls at a
11 telephone number the consumer designates.[] In addition, the written
agreement must be obtained “without requiring, directly or indirectly, that
the agreement be executed as a condition of purchasing any good or
service.[]”

12 *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*,
13 27 F.C.C. Rcd. 1830, 1844 (2012) (footnotes omitted).

14 17. “Robocalls and telemarketing calls are currently the number one source of
15 consumer complaints at the FCC.” Tom Wheeler, *Cutting Off Robocalls* (July 22, 2016),
16 <https://www.fcc.gov/news-events/blog/2016/07/22/cutting-robocalls> (statement of FCC
17 chairman).
18

19 18. “The FTC receives more complaints about unwanted calls than all other
20 complaints combined.” Staff of the Federal Trade Commission’s Bureau of Consumer
21 Protection, *In re Rules and Regulations Implementing the Telephone Consumer*
22 *Protection Act of 1991*, Notice of Proposed Rulemaking, CG Docket No. 02-278, at 2
23 (2016), [https://www.ftc.gov/system/files/documents/advocacy_documents/commentstaff-](https://www.ftc.gov/system/files/documents/advocacy_documents/commentstaff-ftc-bureau-consumer-protection-federal-communications-commission-rulesregulations/160616robocallscomment.pdf)
24 [ftc-bureau-consumer-protection-federal-communications-commission-](https://www.ftc.gov/system/files/documents/advocacy_documents/commentstaff-ftc-bureau-consumer-protection-federal-communications-commission-rulesregulations/160616robocallscomment.pdf)
25 [rulesregulations/160616robocallscomment.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/commentstaff-ftc-bureau-consumer-protection-federal-communications-commission-rulesregulations/160616robocallscomment.pdf).
26
27
28

1 19. In fiscal year 2017, the FTC received 4,501,967 complaints about robocalls,
2 compared with 3,401,614 in 2016. Federal Trade Commission, *FTC Releases FY 2017*
3 *National Do Not Call Registry Data Book and DNC Mini Site* (Dec. 18, 2017),
4 [https://www.ftc.gov/news-events/press-releases/2017/12/ftc-releases-fy-2017-nationaldo-](https://www.ftc.gov/news-events/press-releases/2017/12/ftc-releases-fy-2017-nationaldo-not-call-registry-data-book-dnc)
5 [not-call-registry-data-book-dnc](https://www.ftc.gov/news-events/press-releases/2017/12/ftc-releases-fy-2017-nationaldo-not-call-registry-data-book-dnc).
6

7 20. *The New York Times* recently reported on the skyrocketing number of
8 robocall complaints and widespread outrage about illegal telemarketing. Tara Siegel
9 Bernard, *Yes, It's Bad. Robocalls, and Their Scams, Are Surging*, N.Y. Times (May 6,
10 2018), <https://www.nytimes.com/2018/05/06/your-money/robocalls-riseillegal.html>; *see*
11 *also* Katherine Bindley, *Why Are There So Many Robocalls? Here's What You Can Do*
12 *About Them*, Wall St. J. (July 4, 2018), [https://www.wsj.com/articles/why-there-are-so-](https://www.wsj.com/articles/why-there-are-so-manyrobocalls-heres-what-you-can-do-about-them-1530610203)
13 [manyrobocalls-heres-what-you-can-do-about-them-1530610203](https://www.wsj.com/articles/why-there-are-so-manyrobocalls-heres-what-you-can-do-about-them-1530610203).
14
15
16

17 21. Even more recently, a technology provider combating robocalls warned that
18 nearly half of all calls to cell phones next year will be fraudulent. Press Release, First
19 Orion, *Nearly 50% of U.S. Mobile Traffic Will Be Scam Calls by 2019* (Sept. 12, 2018),
20 [https://www.prnewswire.com/news-releases/nearly-50-of-us-mobile-traffic-will-be-scam-](https://www.prnewswire.com/news-releases/nearly-50-of-us-mobile-traffic-will-be-scam-calls-by-2019-300711028.html)
21 [calls-by-2019-300711028.html](https://www.prnewswire.com/news-releases/nearly-50-of-us-mobile-traffic-will-be-scam-calls-by-2019-300711028.html)
22

23 **Factual Allegations**

24 22. Resolute provides reverse mortgage business, personal and mortgage
25 solutions to its customers.
26

27 23. To generate business through sales, Resolute relies on telemarketing.
28

1 24. However, Resolute's contact with the potential new customers is limited,
2 and the telemarketing is conducted by third parties, such as John Doe Corporation.

3 25. One of Resolute's strategies for telemarketing involves the use of an
4 automatic telephone dialing system ("ATDS") to solicit business by third parties.
5

6 26. Resolute engages the use of this equipment and the technology because it
7 allows for thousands of automated calls to be placed at one time, but its telemarketing
8 representatives, who are paid by the hour, only talk to individuals who pick up the
9 telephone.
10

11 27. Through this method, Resolute shifts the burden of wasted time to the
12 consumers it calls with unsolicited messages.
13

14 28. On December 5, 2018 the Plaintiff received an automated call from John
15 Doe on her cellular telephone line, (925) 735-XXXX.
16

17 29. The Plaintiff's number was called even though it is on the National Do Not
18 Call Registry.

19 30. The call was made with an ATDS because there was a distinct "click and
20 pause" at the outset of the call.
21

22 31. Furthermore, the call was sent from area codes local to the Plaintiff's
23 cellular telephone number. Since it takes a computer-based dialer to manipulate a Caller
24 ID, that is further indication that the calls were made by an ATDS.
25

26 32. Shortly after the call was connected to a live individual, the Plaintiff was
27 able to identify that Resolute's services were being offered.
28

1 33. In fact, Resolute Bank made repeated follow up calls to Ms. Schick in
2 January of 2019.

3 34. The Plaintiff also received an e-mail from Resolute entitled “reverse
4 mortgage information from Peter”.

5 35. The e-mail address that sent the message was
6 “peter.tougigny@resolutefsb.com”.

7 36. The calls were not necessitated by an emergency.

8 37. Plaintiff’s privacy has been violated by the above-described telemarketing
9 robocalls from, or on behalf of, Defendants. The calls were an annoying, harassing
10 nuisance.

11 38. Plaintiff and all members of the Class, defined below, have been harmed by
12 the acts of Defendants because their privacy has been violated, they were annoyed and
13 harassed, and, in some instances, they were charged for incoming calls. The calls
14 occupied their cellular telephone lines, rendering them unavailable for legitimate
15 communication.

16 **Resolute’s Liability and its Arrangement with John Doe**

17 39. For more than twenty years, the FCC has explained that its “rules generally
18 establish that the party on whose behalf a solicitation is made bears ultimate
19 responsibility for any violations.” *In re Rules & Regulations Implementing the TCPA*, CC
20 Docket No. 92-90, Memorandum Opinion and Order, 10 FCC Rcd 12391, 12397 (¶ 13)
21 (1995).

1 40. On May 9, 2013, the FCC released a Declaratory Ruling holding that a
2 corporation or other entity that contracts out its telephone marketing “may be held
3 vicariously liable under federal common law principles of agency for violations of either
4 section 227(b) or section 227(c) that are committed by third-party telemarketers.”²

5
6 41. In that ruling, the FCC instructed that sellers such as Resolute may not
7 avoid liability by outsourcing telemarketing:
8

9 [A]llowing the seller to avoid potential liability by outsourcing its
10 telemarketing activities to unsupervised third parties would leave
11 consumers in many cases without an effective remedy for telemarketing
12 intrusions. This would particularly be so if the telemarketers were judgment
13 proof, unidentifiable, or located outside the United States, as is often the
14 case. Even where third-party telemarketers are identifiable, solvent, and
15 amenable to judgment limiting liability to the telemarketer that physically
16 places the call would make enforcement in many cases substantially more
17 expensive and less efficient, since consumers (or law enforcement
agencies) would be required to sue each marketer separately in order to
obtain effective relief. As the FTC noted, because “[s]ellers may have
thousands of ‘independent’ marketers, suing one or a few of them is
unlikely to make a substantive difference for consumer privacy.”

18 *May 2013 FCC Ruling*, 28 FCC Rcd at 6588 (¶ 37) (internal citations omitted).
19

20 42. The May 2013 FCC Ruling held that, even absent evidence of a formal
21 contractual relationship between the seller and the telemarketer, a seller is liable for
22 telemarketing calls if the telemarketer “has apparent (if not actual) authority” to make the
23 calls. 28 FCC Rcd at 6586 (¶ 34).
24

25 43. The May 2013 FCC Ruling further clarifies the circumstances under which
26 a telemarketer has apparent authority:
27

28 ² *In re Joint Petition Filed by DISH Network, LLC et al. for Declaratory Ruling
Concerning the TCPA Rules*, 28 FCC Rcd 6574, 6574 (¶ 1) (2013) (“May 2013 FCC Ruling”).

1 [A]pparent authority may be supported by evidence that the seller allows
2 the outside sales entity access to information and systems that normally
3 would be within the seller's exclusive control, including: access to detailed
4 information regarding the nature and pricing of the seller's products and
5 services or to the seller's customer information. The ability by the outside
6 sales entity to enter consumer information into the seller's sales or
7 customer systems, as well as the authority to use the seller's trade name,
8 trademark and service mark may also be relevant. It may also be persuasive
9 that the seller approved, wrote or reviewed the outside entity's
10 telemarketing scripts. Finally, a seller would be responsible under the
11 TCPA for the unauthorized conduct of a third-party telemarketer that is
12 otherwise authorized to market on the seller's behalf if the seller knew (or
13 reasonably should have known) that the telemarketer was violating the
14 TCPA on the seller's behalf and the seller failed to take effective steps
15 within its power to force the telemarketer to cease that conduct.

16 FCC Rcd at 6592 (¶ 46).

17 44. By engaging John Doe to make calls on behalf of its agents to generate new
18 business, Resolute "manifest[ed] assent to another person . . . that the agent shall act on
19 the principal's behalf and subject to the principal's control" as described in the
20 Restatement (Third) of Agency.

21 45. Moreover, Resolute maintained interim control over John Doe's actions.

22 46. For example, Resolute had absolute control over whether, and under what
23 circumstances, it would accept a customer.

24 47. Furthermore, Resolute had day-to-day control over John Doe's actions,
25 including the ability to prohibit it from using an ATDS to contact potential customers of
26 Resolute. Resolute failed to make such an instruction to John Doe, and as a result, is
27 liable for John Doe's conduct.

28 48. Resolute also gave interim instructions to John Doe by providing the
volume of calling and leads it would purchase.

1 49. John Doe transferred customer information directly to Resolute. Thus, the
2 company that Resolute hired has the “ability . . . to enter consumer information into the
3 seller’s sales or customer systems,” as discussed in the May 2013 FCC Ruling. As such,
4 the company that Resolute hired is an apparent agent of Resolute.
5

6 50. Resolute had also previously been sued for the actions of third party
7 telemarketers it hired, and as such was on notice that third parties, such as John Doe,
8 were violating the TCPA on Resolute’s behalf.
9

10 51. Resolute has also previously received complaints and has been named in
11 lawsuits related to telemarketing activities.
12

13 52. Finally, the May 2013 FCC Ruling states that called parties may obtain
14 “evidence of these kinds of relationships . . . through discovery, if they are not
15 independently privy to such information.” *Id.* at 6592-593 (¶ 46). Evidence of
16 circumstances pointing to apparent authority on behalf of the telemarketer “should be
17 sufficient to place upon the seller the burden of demonstrating that a reasonable consumer
18 would not sensibly assume that the telemarketer was acting as the seller’s authorized
19 agent.” *Id.* at 6593 (¶ 46).
20
21
22

23 **Class Action Allegations**

24 53. As authorized by Rule 23 of the Federal Rules of Civil Procedure, Plaintiff
25 brings this action on behalf of a class of all other persons or entities similarly situated
26 throughout the United States.
27
28

1 54. The class of persons Plaintiff proposes to represent are tentatively defined
2 as:

3 All persons within the United States to whom: (a) Resolute and/or a third
4 party acting on their behalf, made one or more non-emergency telephone
5 calls; (b) to their cellular telephone number; (c) using an automatic
6 telephone dialing system or an artificial or prerecorded voice; and (d) at any
7 time in the period that begins four years before the date of the filing of this
8 Complaint to trial.

9 Excluded from the class are the Defendants, and any entities in which the Defendants
10 have a controlling interest, the Defendants' agents and employees, any judge to whom
11 this action is assigned and any member of such judge's staff and immediate family.
12

13 55. The class as defined above is identifiable through phone records and phone
14 number databases.

15 56. The potential class members number at least in the thousands, since
16 automated telemarketing campaigns make calls to hundreds or thousands of individuals a
17 day. Individual joinder of these persons is impracticable.
18

19 57. Plaintiff is a member of the proposed class.
20

21 58. There are questions of law and fact common to Plaintiff and to the
22 proposed class, including but not limited to the following:

23 a. Whether Defendants violated the TCPA by using automated
24 telemarketing to call cellular telephones;
25

26 b. Whether Defendants placed calls using an automatic telephone
27 dialing system;
28

 c. Whether Resolute is vicariously liable for the conduct of John Doe;

1 d. Whether Defendants placed calls without obtaining the recipients'
2 prior consent for the call;

3 e. Whether the Plaintiff and the class members are entitled to statutory
4 damages because of Defendants' actions.
5

6 59. Plaintiff's claims are typical of the claims of class members. Plaintiff's
7 claims, like the claims of the Class, arise out of the same common course of conduct by
8 the Defendants and are based on the same legal and remedial theories.
9

10 60. Plaintiff is an adequate representative of the class because her interests do
11 not conflict with the interests of the class, she will fairly and adequately protect the
12 interests of the class, and she is represented by counsel skilled and experienced in class
13 actions, including TCPA class actions.
14

15 61. Common questions of law and fact predominate over questions affecting
16 only individual class members. The only individual question concerns identification of
17 class members, which will be ascertainable from records maintained by Defendants
18 and/or their agents.
19

20 62. Management of these claims is likely to present significantly fewer
21 difficulties than are presented in many class claims because the calls at issue are all
22 automated. Class treatment is superior to multiple individual suits or piecemeal litigation
23 because it conserves judicial resources, promotes consistency and efficiency of
24 adjudication, provides a forum for small claimants, and deters illegal activities. There
25 will be no significant difficulty in the management of this case as a class action.
26
27
28

1 63. The likelihood that individual members of the class will prosecute separate
2 actions is remote due to the time and expense necessary to prosecute an individual case.
3
4

5
6
7 **First Cause of Action**

8 **Violation of the TCPA, 47 U.S.C. § 227(b) and 47 C.F.R. § 64.1200(a)**

9 64. Plaintiff incorporates the allegations from all previous paragraphs as if fully
10 set forth herein.

11 65. The Defendants violated the TCPA by (a) initiating a telephone call using
12 an automated dialing system or prerecorded voice to Plaintiff's telephone number
13 assigned to a cellular telephone service, or (b) by the fact that others caused the initiation
14 of those calls on its behalf. *See* 47 C.F.R. 64.1200(a)(1)(iii); 47 U.S.C. § 227(b)(1).
15

16 66. The Defendants' violations were negligent, willful, or knowing.
17

18 67. Plaintiff and members of the class are also entitled to and do seek an
19 injunction prohibiting Defendants and/or their affiliates and agents from placing non-
20 emergency calls to any cellular telephone number using an ATDS and/or artificial or
21 prerecorded voice.
22

23 **Prayer for Relief**

24 For herself and all class members, Plaintiff requests the following relief:
25

26 1. That Defendants, their agents, and anyone acting on their behalf, be
27 immediately restrained from altering, deleting, or destroying any documents or records
28 that could be used to identify class members.

1 2. That the Court certify the proposed class under Rule 23 of the Federal
2 Rules of Civil Procedure.

3 3. That the Plaintiff and all class members be awarded statutory damages of
4 \$500 for each negligent violation of the TCPA, and \$1,500 for each knowing violation,
5 and all other relief that is just and equitable.

6 4. **The TCPA authorizes injunctive relief to prevent the Defendants from**
7 **using automatic telephone dialing equipment.** The Plaintiff respectfully petitions this
8 Court to order the Defendants, and their employees, agents and independent contractors,
9 to immediately cease engaging in unsolicited telemarketing in violation of the TCPA.
10
11
12
13

14 Plaintiff requests a jury trial as to all claims of the complaint so triable.
15

16
17 Dated: April 5, 2019

Respectfully Submitted,

18 /s/ Trinette G. Kent
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22 Phoenix, AZ 85018
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27
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